



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 450

[EPA-HQ-OW-2010-0884; FRL-9906-51-OW]

RIN 2040-AF44

Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing changes to the effluent limitations guidelines and standards for the Construction and Development point source category. EPA is promulgating these changes pursuant to a settlement agreement to resolve litigation. This final rule withdraws the numeric discharge standards, which are currently stayed, and changes several of the non-numeric provisions of the existing rule.

DATES: This final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. **EPA-HQ-OW-2010-0884**. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the USEPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1744.

FOR FURTHER INFORMATION CONTACT: Mr. Jesse W. Pritts at Engineering and Analysis Division, Office of Water (4303T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: 202-566-1038; fax number: 202-566-1053; email address: pritts.jesse@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

Regulated Entities

Entities potentially regulated by this action include:

Category	Examples of Regulated Entities	North American Industry Classification System (NAICS) Code
Industry	Construction activities required to obtain NPDES permit coverage and performing the following activities:	
	Construction of buildings, including building, developing and general contracting	236
	Heavy and civil engineering construction, including land subdivision	237

EPA does not intend the preceding table to be exhaustive, but provides it as a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria at 40 CFR 450.10 and the definition of "storm water discharge associated with industrial activity" and "storm water discharge associated with small construction activity" in existing EPA regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15), respectively. If you have questions regarding the applicability of this action to a particular site, consult

the person listed in the preceding "FOR FURTHER INFORMATION CONTACT" section.

Overview

This preamble describes the terms, acronyms, and abbreviations used in this document; the legal authority for this final rule; background information; and a summary of the final changes.

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I. Legal Authority

EPA is promulgating these regulations under the authorities of sections 101, 301, 304, 306, 308, 401, 402, 501 and 510 of the Clean Water Act (CWA), 33 U.S.C. 1251, 1311, 1314, 1316, 1318, 1341, 1342, 1361 and 1370, and pursuant to the Pollution Prevention Act of 1990, 42 U.S.C. 13101 et seq.

II. Purpose & Summary of the Final Rule

A. Background

EPA promulgated Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category (hereafter referred to as the “C&D rule”) (74 FR 62996, December 1, 2009). The C&D rule established requirements based on Best Practicable Control Technology Currently Available, Best Available Technology

Economically Achievable, Best Conventional Pollutant Control Technology, and New Source Performance Standards based on Best Available Demonstrated Control Technology. Construction activities like clearing, excavating, and grading significantly disturb the land. The disturbed soil, if not managed properly, can easily be washed off of the construction site during storms and enter water bodies. Stormwater discharges from construction activities can cause an array of physical, chemical and biological impacts to receiving streams.

The C&D rule included non-numeric requirements to:

- implement erosion and sediment controls;
- stabilize soils;
- manage dewatering activities;
- implement pollution prevention measures;
- prohibit certain discharges; and
- utilize surface outlets for discharges from basins and impoundments.

The C&D rule also established a numeric limitation on the allowable level of turbidity in discharges from certain construction sites. The technology basis for the final numeric limitation was passive treatment controls including polymer-aided settling to reduce the turbidity in discharges.

Following promulgation of the C&D rule, the Wisconsin Builders Association, the National Association of Home Builders (NAHB) and the Utility Water Act Group (UWAG) filed petitions for review in the U.S. Circuit Courts of Appeals for the Fifth, Seventh, and D.C. Circuits. The petitions were consolidated in the Seventh Circuit.

Wisconsin Builders Association, et al. v. EPA, Case Nos. 09-4113, 10-1247, and 10-1876 (7th Cir.). On July 8, 2010, the petitioners filed their briefs.

In April 2010, the Small Business Administration (SBA) filed with EPA a petition for administrative reconsideration of several technical aspects of the C&D rule. SBA identified potential deficiencies with the dataset that EPA used to support its decision to adopt the numeric turbidity limitation. In June 2010, NAHB also filed a petition for administrative reconsideration with EPA incorporating by reference SBA's argument regarding the potential deficiencies in the data.

On August 12, 2010, EPA filed an unopposed motion with the Court seeking to hold the litigation in abeyance until February 15, 2012 (see the docket for this action, EPA-HQ-OW-2010-0884-0085), and asking the Court to remand the record to EPA and vacate the numeric limitation portion of the rule. In addition, EPA agreed to reconsider the numeric limitation and to solicit site-specific information regarding the applicability of the numeric effluent limitation to cold weather sites and to small sites that are part of a larger project.

On August 24, 2010, the Court issued an order remanding the matter to the Agency but without vacating the numeric limitation. Subsequently on September 9, 2010, the petitioners filed an unopposed motion for clarification or reconsideration of the Court's August 24, 2010 order, asking the Court again to vacate the numeric limitation. On September 20, 2010, the Court remanded the administrative record to EPA, and ordered the case held in abeyance until February 15, 2012, but did not vacate the numeric limitation. During this period, EPA provided additional information in the docket to supplement the administrative record for the C&D rule (see EPA-HQ-OW-2008-0465-

2124 through EPA-HQ-OW-2008-0465-2134) and an updated response to comment document (see EPA-HQ-OW-2008-0465-2135).

In November 2010, EPA issued a direct final regulation and a companion proposed regulation to stay the numeric limitation at 40 CFR 450.22 indefinitely (75 FR 68215, November 5, 2010 and 75 FR 68305, November 5, 2010). The proposed rule solicited comment due no later than December 6, 2010. Since no adverse comments were received, the direct final rule took effect on January 4, 2011.

As of this date, neither states nor EPA were required to incorporate the numeric turbidity limitation and monitoring requirements found at § 450.22(a) and § 450.22(b) into NPDES permits because the numeric limitation was stayed. However, the remainder of the C&D rule was still in effect and had to be incorporated into newly issued NPDES permits.

After issuing the stay of the numeric turbidity limitation, EPA continued to consult with stakeholders regarding next steps with respect to numeric discharge standards. EPA published a Federal Register notice (77 FR 112, January 3, 2012) seeking data on the effectiveness of technologies in controlling turbidity in discharges from construction sites and information on other related issues.

EPA also continued to meet with the petitioners in an effort to settle the litigation over the C&D rule. On December 10, 2012, EPA entered into a settlement agreement with petitioners to resolve the litigation in *Wisconsin Builders Association, et al. v. EPA*, Case Nos. 09-4113, 10-1247, and 10-1876 (7th Cir.). The settlement agreement provides for EPA to propose for public comment certain changes specific to the non-numeric portions of the C&D rule, as well as withdrawal of the numeric limitation, and take final

action on the proposal. Under the terms of the settlement agreement, by April 15, 2013 EPA was to sign for publication in the Federal Register a notice of proposed rulemaking, with at least a 30-day comment period, to amend the C&D rule in a manner substantially similar to Exhibit A, which is attached to the settlement agreement. The settlement then provides that by February 28, 2014, EPA will take final action on the proposed rule.

Under the settlement, if EPA takes the above actions by the specified dates, and EPA's final action on the proposed rule amends the C&D rule in any manner, then Petitioners and EPA will promptly file a joint request with the Court asking it to dismiss the C&D litigation. In addition, if EPA's final action amends the C&D rule in a manner substantially similar to Exhibit A, Petitioners will not seek judicial review of those amendments. Finally, the settlement provides that within 60 days after EPA signs the proposal mentioned above, NAHB and EPA will file a joint request with the Court to dismiss NAHB's challenge to the 2012 Construction General Permit (CGP), which EPA issued on February 29, 2012 (see 77 FR 12286). EPA proposed a rule on April 1, 2013. Today's final rule satisfies EPA's commitments under the settlement agreement.

B. Revisions to 40 CFR Part 450

The revisions to 40 CFR part 450 being promulgated consist of the following three elements:

- addition of a definition of "infeasible";
- revisions to the effluent limitations reflecting the best practicable control technology currently available (BPT), effluent limitations reflecting the best available technology economically achievable (BAT), effluent limitations reflecting the best conventional pollutant control technology (BCT), and the new

source performance standards reflecting the best available demonstrated control technology (NSPS) found at 40 CFR 450.21, 450.22, 450.23 and 450.24, respectively; and

- withdrawal of the numeric turbidity effluent limitation and monitoring requirements found at 40 CFR 450.22(a) and 450.22(b) and reserving these subparts.

EPA has made these revisions to clarify when and where these provisions apply and what exceptions apply. Today's changes provide clarity to permitting authorities on how to implement or incorporate these provisions into permits. The following discusses each of the changes promulgated today, and summarizes the comments EPA received on each of the changes.

1. Addition of Definition at 40 CFR 450.11

EPA proposed to add a definition of infeasible at 40 CFR 450.11(b). Several of the provisions of the C&D rule require permittees to implement controls, unless infeasible. EPA did not provide a definition of infeasible in the 2009 C&D rule, although EPA did provide a definition in the preamble (74 FR 63005, 63017, December 1, 2009). The proposed definition of infeasible was derived from EPA's preamble language from the 2009 final rule and the 2012 CGP.

EPA received a number of comments on the proposed definition of infeasible. Some commenters supported EPA's inclusion of a definition, while some did not. Some commenters offered specific revisions to the definition, while others requested that EPA provide additional examples of specific instances where a given practice may be

infeasible. Some commenters requested that EPA incorporate an infeasibility condition into all of the requirements of the final rule, not just those where it is currently included.

EPA had previously concluded that an infeasibility provision for some requirements (specifically, buffers, preserving topsoil, and use of surface outlets) was appropriate, given that site-specific constraints may exist. EPA now concludes that a definition of infeasible is appropriate in the rule in order to provide clarity to permitting authorities. EPA has not changed the proposed definition for today's final rule as a result of comments received because the definition allows sufficient flexibility for permitting authorities to incorporate appropriate requirements into their permits to address the limited number of circumstances where a given requirement may be infeasible. See the comment response document for today's action for additional discussion of the comments received.

2. Revision of 40 CFR 450.21(a)(1)

EPA received several comments on this proposed amended requirement. Some stated that this requirement is not needed since there are other ways of controlling erosion besides controlling volume and velocity, or that the requirement is too prescriptive. Others stated that the "within the site" language that is contained in the 2009 final rule is necessary and should be retained in this rule so that permittees are not held responsible for installing controls beyond their area of disturbance in order to control erosion caused by their discharges. Others stated that EPA does not have authority to regulate internal processes at a construction site, and that removal of the "within the site" language is justified on this basis.

After consideration of comments, EPA did not make any changes to the proposed requirement for this final rule. EPA has determined that the revision, as proposed, is an important component of construction stormwater management as increased volume and duration of flows resulting from removal of vegetation and soil compaction that accompany construction activities can contribute to significant increases in soil erosion and transport and discharge of pollutants to surface waters. EPA has authority to promulgate non-numeric effluent limitations that regulate internal processes at construction sites in order to control and minimize the discharge of pollutants to surface waters. See EPA-HQ-OW-2008-0465-2124 through EPA-HQ-OW-2008-0465-2134 for discussion linking up-slope/on-site activities to controlling or minimizing the discharge of pollutants from the site to surface waters. See also *Citizens Coal Council, et al. v. EPA*, 446 F.3d 879, 895 (6th Cir. 2006)(“under the [Clean Water] Act, effluent limitations are not limited to numeric discharges but encompass ‘any restriction’ on discharges”); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2nd Cir. 2005)(“rather than setting forth *numerical* effluent limitations for land application of manure, the CAFO Rule establishes *non-numerical* effluent limitations in the form of best management practices”); *Texas Municipal Power Agency v. EPA*, 836 F.2d 1482, 1488 (5th Cir. 1988)(“it is sometimes necessary to regulate discharges within the treatment process to control discharges at the end ... [t]his position has support in the language of the CWA, its legislative history, and common sense.”); *Public Service Company of Colorado, Fort St. Vrain Station v. EPA*, 949 F.2d 1063, 1065 (10th Cir. 1991) (“We find no clear Congressional or Presidential intent expressly forbidding EPA from imposing internal

waste stream effluent limitations when such limitations would be impracticable to monitor at the end of the pipe.”).

3. Revision of 40 CFR 450.21(a)(2)

EPA received a number of comments on this proposed revision. One commenter suggested that EPA change the language to require management of local scour. Others suggested that EPA's proposed change to limit erosion in the "immediate vicinity of discharge points" narrows the requirement from what was contained in the 2009 rule. Others stated that EPA does not have authority under the effluent guidelines program to control erosion in receiving waters since effluent guidelines regulate the discharge of pollutants from point sources, and more broadly that EPA does not have authority to regulate volume. Some comments stated that projects with constrained space, such as linear projects, cannot feasibly control the volume of discharges. Other comments suggested that the requirement is too prescriptive, and that there are other measures to control erosion in receiving waters. Some commenters suggested that the "in the immediate vicinity" language is ambiguous and should be removed, and that permittees should be responsible for downstream erosion caused by their discharges. Other comments stated that the language should be expanded to state that attainment of water quality standards should be the goal and that the discharges should not contribute to an existing impairment.

EPA made one change to the proposed requirement for today's final rule, which is the insertion of the words "and scour" after the word "erosion". EPA made this change as a result of comments received by the American Association of State Highway and Transportation Officials (AASHTO) (see EPA-HQ-OW-2010-0884-0194), which

indicated that "local scour" is an appropriate term for the erosion in receiving waters that EPA is intending to address by this requirement. EPA did not include the "local" qualifier since the requirement is limited to erosion "in the immediate vicinity" of discharge points, and therefore the addition of "local" would be redundant. EPA has not elected to make any of the other changes suggested by commenters. While EPA understands that some would find a requirement to also include downstream erosion environmentally beneficial, it is more appropriate to consider downstream erosion on a site-specific water quality basis than in this nationally applicable, technology-based rule.

4. Revision of 40 CFR 450.21(a)(6)

EPA received several comments on this proposed amended requirement. Some commenters expressed concern over requiring infiltration for controlling pollutants, indicating that there are other methods for reducing pollutants other than infiltration. Commenters also were concerned about the requirement to provide buffers, indicating that some disturbance would be needed, such as stream crossing. Commenters were also concerned about the overlap between this requirement and Section 404 permits, and the switch from "surface waters", which was the language in the 2009 rule, to "Waters of the United States," as they believed that the latter has a broader scope. Specific mention was made of the need to install buffers around jurisdictional wetlands. Commenters also requested clarification of the terms "provide" and "natural buffers".

EPA did not make any changes to the proposed requirement for today's final rule. The language, as proposed, includes an exception for infeasibility and provides sufficient flexibility for permitting authorities to incorporate appropriate language into permits to address the range of site-specific conditions that may exist and to address instances where

a buffer or infiltration may be infeasible for some part of a project. See the 2012 CGP for an example of how EPA has incorporated buffer requirements, as well as alternative controls, into a general permit.

EPA has not changed the proposed use of the term “waters of the United States” instead of the phrase “surface waters.” EPA intended that the two phrases mean the same set of waters. See the comment response document for specific responses to other comments concerning this provision.

5. Revision of 40 CFR 450.21(a)(7)

EPA proposed to amend this requirement, as well as separate the two provisions (minimizing soil compaction and preserving topsoil) into two separate requirements. EPA received several comments on this proposed amended requirement. Some commenters requested more specificity on types of practices that would meet this provision, such as use of soil amendments or deep ripping. Other comments suggested that the use of soil compaction for temporary soil stabilization should be permitted. Still other comments indicated that there are methods to provide stabilization other than preserving topsoil.

EPA did not make any changes to the proposed requirement for today's final rule. The provision, as proposed, provides sufficient flexibility for permitting authorities to develop appropriate language for their permits and provides permittees sufficient flexibility to obtain relief in cases where these practices would be infeasible based on site-specific conditions. The requirement to minimize soil compaction does not prohibit use of compaction for temporary stabilization since the requirement is to minimize, not prohibit, compaction. If the permitting authority determines that compaction is an appropriate temporary stabilization measure (considering other stabilization language

contained at 450.21(b)), then it may elect to develop appropriate language to this effect in its permit.

6. Revision of 40 CFR 450.21(b)

EPA received several comments on this proposed amended requirement. One commenter requested an exemption from the "immediate" initiation of stabilization requirement for areas of disturbance less than one acre on a site so as to allow prioritization of stabilization activities. The commenter also requested inclusion of the definition of "initiate immediately" from the 2012 CGP, and other commenters requested additional clarification of the term "immediately." Commenters also requested that additional exemptions be provided, for example, during periods with low temperatures or excessive or inadequate moisture that would limit the ability to establish vegetative stabilization. One commenter was also concerned that the language regarding "intended function" was not specific, and that this could allow permittees to take advantage of this exemption. This commenter suggested that requiring that the permittee obtain a waiver from stabilization would be a reasonable requirement.

The final rule allows an exemption from stabilization in limited circumstances. In general, stabilization represents sound industry practice to minimize discharges from an active construction site. Industry representatives have pointed out to the Agency that there are limited circumstances where this requirement may not make sense. Therefore the rule gives permitting authorities flexibility to provide a waiver from stabilization in limited circumstances (an example might be a motocross track where the intended function is an unstabilized area). Rather than specify in this national rule all such circumstances, which would likely miss some reasonable exception, the rule allows

permitting authorities to define these circumstances at the time of permitting. As stated above, however, EPA expects that sound industry practice of stabilizing the site immediately will be the norm.

With respect to providing additional exemptions from vegetative stabilization, EPA notes that 450.21(b) does not require *vegetative* stabilization. Both vegetative and non-vegetative stabilization may be appropriate measures, consistent with permit requirements. In arid, semiarid and drought-stricken areas, the amended requirement states that alternative "e.g., non-vegetative" stabilization measures must be employed in these areas because vegetative stabilization is infeasible (because adequate moisture would not be present to establish and maintain such vegetation). However, the language does not limit the use of non-vegetative stabilization in other instances, such as during cold weather conditions. All areas (except those where the intended function necessitates that it remain disturbed) would require stabilization, vegetative or non-vegetative, consistent with requirements developed by the permitting authority.

After consideration of all comments on this provision, EPA did not make any changes to the proposed requirement for today's final rule. EPA has determined that the requirement contains sufficient flexibility for permitting authorities to develop appropriate criteria for vegetative and non-vegetative stabilization, and to develop permit language regarding the timing of such stabilization activities.

7. Revision of 40 CFR 450.21(d)(2)

EPA did not receive any substantive comments on this proposed amended requirement, and therefore EPA did not make any changes to the proposed requirement for today's final rule.

8. Removal of Numeric Standard and Monitoring Provisions at 40 CFR 450.22(a) and 450.22(b)

The final change removes the numeric discharge standard and monitoring requirements previously found at 40 CFR 450.22(a) and 450.22(b).

EPA received several comments on this proposed change. While many commenters were supportive of removing the numeric turbidity effluent limitation and monitoring requirements, some commenters were opposed to this and requested that EPA reinstate a numeric limitation. Some commenters suggested that EPA completely remove these sections of the CFR instead of reserving these sections.

EPA is withdrawing the numeric limitation but has reserved these paragraphs for potential revisions should EPA decide to propose and promulgate additional effluent limitations guidelines and monitoring requirements in a future rulemaking. The Agency is considering data and comments submitted in response to the January 3, 2012 Federal Register notice (77 FR 112) seeking additional information and data on numeric standards. At this time, EPA is concerned that a numeric limitation may create a disincentive to green infrastructure techniques for managing stormwater. For example, meeting a numeric standard may require installation of a sediment basin or other impoundment on certain sites, which may be a disincentive to installing distributed stormwater controls. Also, EPA recognizes that additional data collection would likely be necessary in order to inform any establishment of numeric discharge standards and monitoring requirements in the future. At such time that EPA decides on a path forward with respect to numeric discharge standards and monitoring requirements, EPA will take appropriate actions to notify interested stakeholders. EPA encourages interested parties to

continue submitting data and information to EPA with respect to numeric discharge standards at construction sites. In the interim, it is preferable to reserve these sections of the CFR for future action. Removing these paragraphs altogether would require re-organization of other sections of the rule. EPA sees no meaningful disadvantage of reserving these sections as opposed to removing these sections.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). The action does not impose an information collection burden because the amendments do not impose any data collection or reporting requirements.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

The final rule clarifies applicability of the existing non-numeric effluent limitations at 40 CFR Part 450 and provides exemptions to some requirements in limited cases. We have therefore concluded that today's final rule will relieve regulatory burden for affected small entities.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule clarifies applicability of the existing non-numeric effluent limitations at 40 CFR Part 450 and provides exemptions to some requirements in limited cases. The rule does not impose new or more stringent requirements, and therefore this action does not subject regulated entities to any costs incremental to the existing rule. Thus, this rule is not subject to the requirements of sections 202 or 205 of the Unfunded Mandates Reform Act (UMRA).

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule clarifies applicability of the existing non-numeric effluent limitations at 40 CFR Part 450 and provides exemptions to some requirements in limited cases. These requirements apply to all governmental entities that undertake construction activities regulated at 40 CFR 122.26, and therefore do not significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule clarifies applicability of the existing non-numeric effluent limitations at 40 CFR Part 450 and provides exemptions to some requirements in limited cases. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule clarifies applicability of the existing non-numeric effluent limitations at 40 CFR Part 450 and provides exemptions to some requirements in limited cases. The rule does not impose new or more stringent requirements, and therefore this action would not subject regulated entities to any costs incremental to the existing rule. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use

voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involved technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income populations from this final rule. This final rule clarifies applicability of the existing non-numeric effluent limitations at 40 CFR Part 450 and provides exemptions to some requirements in limited cases. While EPA considers it unlikely, it is possible that the changes to some of these requirements could result in greater pollution discharge to waters of the United States. However, EPA does not expect the quantity of

pollution discharges to specific waterbodies or at the national level to significantly increase as a result of this final rule. Furthermore, the primary pollutants discharged by this industry, which are sediment and turbidity, are present in background levels to varying quantities in waters of the United States. Therefore, the extent, if any, of changes in human health or environmental effects as a result of this action would depend upon waterbody-specific conditions and the locations and interaction of populations with those waterbodies. Due to the varying nature and location of construction site discharges, and due to the fact that there are often other sources of sediment and turbidity pollution in waterbodies, it is not practicable to quantify the extent to which this action would alter levels of pollution discharges or whether any change in pollution discharges as a result of this action would contribute disproportionately high and adverse human health or environmental effects on minority and/or low income populations.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective [insert date 60 days after publication in the Federal Register].

L. Judicial Review

In accordance with 40 CFR 23.2, today's rule is considered promulgated for the purposes of judicial review as of 1 p.m. Eastern Standard Time, [insert date 14 days after publication in the Federal Register]. Under Section 509(b)(1) of the Clean Water Act (CWA), judicial review of today's effluent limitations guidelines and new source performance standards may be obtained by filing a petition in the United States Circuit Court of Appeals for review within 120 days from the date of promulgation of these guidelines and standards. Under Section 509(b)(2) of the CWA, the requirements of this regulation may not be challenged later in civil or criminal proceedings brought to enforce these requirements.

List of Subjects in 40 CFR Part 450

Environmental protection, Construction industry, Land development, Water pollution control.

Dated: February 20, 2014.

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 450--CONSTRUCTION AND DEVELOPMENT POINT SOURCE

CATEGORY

1. The authority citation for part 450 is revised to read as follows:

AUTHORITY: 33 U.S.C. 1311, 1312, 1314, 1316, 1341, 1342, 1361 and 1370.

Subpart A – General Provisions

2. Section 450.11 is amended by adding paragraph (b) to read as follows:

§450.11 General definitions.

(b) *Infeasible*. Infeasible means not technologically possible, or not economically practicable and achievable in light of best industry practices.

Subpart B – Construction and Development Effluent Guidelines

3. Section 450.21 is amended by:

- a. Revising paragraphs (a)(1), (a)(2), (a)(6), and (a)(7).
- b. Adding paragraph (a)(8).
- c. Revising paragraph (b).
- d. Revising paragraph (d)(2).

The added and revised text read as follows:

§ 450.21 Effluent limitations reflecting the best practicable technology currently available (BPT).

(a) ***

(1) Control stormwater volume and velocity to minimize soil erosion in order to minimize pollutant discharges;

(2) Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize channel and streambank erosion and scour in the immediate vicinity of discharge points;

(6) Provide and maintain natural buffers around waters of the United States, direct stormwater to vegetated areas and maximize stormwater infiltration to reduce pollutant discharges, unless infeasible;

(7) Minimize soil compaction. Minimizing soil compaction is not required where the intended function of a specific area of the site dictates that it be compacted; and

(8) Unless infeasible, preserve topsoil. Preserving topsoil is not required where the intended function of a specific area of the site dictates that the topsoil be disturbed or removed.

(b) Soil Stabilization. Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. In arid, semiarid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, alternative stabilization measures must be employed as specified by the permitting authority. Stabilization must be completed within a period of time determined by the permitting authority. In limited circumstances,

stabilization may not be required if the intended function of a specific area of the site necessitates that it remain disturbed.

(d) ***

(2) Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater.

Minimization of exposure is not required in cases where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination (such as final products and materials intended for outdoor use); and

§450.22 [AMENDED]

4. Section 450.22 is amended by removing and reserving paragraphs (a) and (b).

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